In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-170

CRENSHAW COUNTY PRIVATE SCHOOL FOUNDATION,
PETITIONER

v.

GEORGE P. SHULTZ,
SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

Petitioner, a nonprofit educational corporation, brought this suit in the United States District Court for the Middle District of Alabama, seeking to enjoin respondents from suspending or revoking their ruling that petitioner was a charitable organization exempt from income taxation under Section 501(c)(3) of the Internal Revenue Code of 1954, 26 U.S.C. 501(c)(3). The district court dismissed petitioner's suit on the ground that it was barred by the Anti-Injunction Act, Section 7421(a) of the Code, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *"

(Pet. App. A-12 to A-19).[1] The court of appeals affirmed (Pet. App. A-1 to A-9).

1. Petitioner was organized in 1965 for the stated purpose of operating a school in Alabama for students whose parents had become discontented with First Amendment restrictions against religious activities in public schools. In 1969, after the school had been open for one year, the Internal Revenue Service issued petitioner a letter ruling that it was exempt from income taxes under Section 501(c)(3) of the Code. In 1970, however, the Service publicly announced that it would no longer consider schools having racially discriminatory admissions policies to be exempt under Section 501(c)(3).

Following this announcement, the Service in 1971 requested petitioner to indicate whether it had a racially discriminatory admissions policy and, if it did not have such a policy, to advertise that fact to the public. Petitioner refused to disclose whether its admissions policy was discriminatory. Accordingly, the Service revoked its prior ruling that petitioner was exempt from taxation. Petitioner then instituted this suit, alleging, apparently for the first time, that its enrollment is open to all adherents of the Christian faith, but acknowledging that no non-white has ever applied for admission to or attended the school.

[1] The district court also rested its decision on lack of equitable jurisdiction, holding that petitioner had an adequate remedy at law. Lack of equitable jurisdiction, even standing alone, is of course a sufficient basis for dismissal. And, as we have argued in our brief (at pp. 34-37) in *Alexander* v. *"Americans United" Inc.*, petition for writ of certiorari granted June 4, 1973, No. 72-1371, an organization seeking to contest the revocation of its exemption ruling does have an adequate remedy at law. However, under *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, this ground of decision appears to be subsumed under, not separable from, the Anti-Injunction Act.

2. The courts below correctly determined that petitioner's suit is barred by the Anti-Injunction Act. In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, this Court held that, to escape the prohibition of the Act, a plaintiff must show that it has no adequate remedy at law and that it is certain to prevail on the merits. Petitioner fell far short of meeting these jurisdictional prerequisites. As we have shown elsewhere (see note 1, *supra*), organizations in petitioner's circumstances have an adequate remedy at law. Moreover, as the court below properly concluded, petitioner had not even established that it was likely to prevail on the merits, let alone that it was certain to do so.[2]

To obtain a ruling of tax exemption, an organization must submit sufficient information, including written representations—made under penalties of perjury—concerning proposed future conduct, to permit the Internal Revenue Service to determine whether the organization qualifies for the exemption. In particular, an educational organization such as petitioner, must establish, *inter alia*, that it has and intends to maintain a racially non-discriminatory admissions policy. *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997. Petitioner made no such affirmative showing to respondents and therefore has not established the merits of its claim that it is entitled to an exemption ruling.

3. Nevertheless, underlying this case is the same fundamental legal issue also presented in *Alexander* v. *"Americans United" Inc.*, petition for writ of certiorari granted June 4, 1973, No. 72-1371, and *Bob Jones*

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[2] The court of appeals did not reach the question whether petitioner had an adequate remedy at law.

University v. *Shultz,* petition for a writ of certiorari pending, No. 72-1470. The issue is whether the strict jurisdictional prerequisites set forth in *Williams Packing* are applicable to suits brought by organizations contesting withdrawal of recognition of their tax exempt status by the Internal Revenue Service. The court of appeals in *"Americans United"* departed from *Williams Packing* by holding that such an organization need not establish, as a jurisdictional prerequisite, that it is certain to prevail on the merits of its claim; it was sufficient, that court stated, for such an organization to allege that the statute as applied to it was unconstitutional. This holding directly conflicts with that in *Bob Jones,* where the plaintiff's constitutional challenge—that its racially dicriminatory admissions policy was a protected exercise of religion which could not be punished by revocation of its tax exemption ruling—was subjected to the *Williams Packing* tests.

Petitioner here apparently does not seriously question the constitutionality of the Section 501(c)(3) non-discrimination requirement as applied to it. Therefore this case is distinguishable from *"Americans United"* and *Bob Jones.* However, since the jurisdictional issues in all three cases raise questions concerning the continued vitality of the *Williams Packing* tests, we believe that the Court should defer acting on this petition pending disposition of *"Americans United"* and *Bob Jones.*

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09